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IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 1260

CHRISTIAN CHRISTIANSEN,
Petitioner,

vs.

UNITED STATES OF AMERICA and WELLESLEY R. SLIFER, Special Agent, Internal Revenue Service,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Supreme Court of the United States

OCTOBER TERM 1965

No.

CHRISTIAN CHRISTIANSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA and WELLESLEY R. SLIFER, Special Agent, Internal Revenue Service.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Christian Christiansen, prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 16, 1966.

Opinion Below

The Order of the United States District Court for the District of New Jersey is found in the record (R17a); and the Opinion and Order of the United States Court of Appeals for the Third Circuit is found at page 15 *infra*.

Jurisdiction

This case involves a United States District Court Order requiring the Petitioner to produce certain corporate records in a criminal investigation. The judgment of the United States Court of Appeals affirming the District Court order was entered on March 16, 1966. Jurisdiction is conferred on this Court by 28 U. S. C. §1254(1).

Question Presented

Does the privilege against self-incrimination, as afforded by the Fifth Amendment, permit a Federal court to order an individual to produce corporate records of his wholly-owned corporation *solely because* the records are corporate?

Constitutional Amendments Involved

Amendment IV—Searches and seizures.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V—Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be

a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement

The facts in this case are not disputed inasmauch as the District Court made its decision based upon the affidavits of the Petitioner and a Special Agent of the Internal Revenue Service without a plenary hearing and without requesting additional evidence at the return date of the government's Order to Show Cause. These facts may be found in the record (R.11a-16a).

Briefly stated, the government indicated quite clearly in its examination from which this matter emanates that the "person" in whom it was interested was not any corporation but rather the Petitioner, Christian Christiansen, as an individual. On May 7, 1964, May 26, 1964, June 15, 1964 and March 20, 1965 the government served the petitioner with administrative summonses requesting him to produce corporate records. The form of these summonses can be found in the record at pages 2a-5a. Each of these summonses was entitled "In the matter of the tax liability of Christian Christiansen, Warren Township, New Jersey." On the return date of all of these summonses the petitioner brought with him the records sought but claimed the privilege against self-incrimination due to the fact that the investigation was clearly concerned with the "tax liability of Christian Christiansen" and the investigation was being conducted by a Special Agent of the Internal Revenue Service who was charged with the investigation of criminal matters.

In addition to these summonses, other summonses were served on the Petitioner on May 26, 1964, January 22, 1965

and March 20, 1965 which were entitled "In the matter of the tax liability of [a corporation], Warren Township, New Jersey." On the return date of these summonses the petitioner claimed his privilege against self-incrimination due to the fact that these records would tend to incriminate him personally and further due to the government's obvious effort to circumvent the privilege merely by relabeling the summonses with the appropriate corporate designation.

With respect to the summonses served on May 7, 1964, May 26, 1964, June 15, 1964, January 22, 1964 and the personal ones of March 20, 1965, there was never an attempt by the government to enforce same. The present proceeding results from the government's effort to enforce the summonses entitled in the matter of the corporate liabilities which were served on March 20, 1965.

The records as to which production is being sought are incriminatory as to the petitioner individually.

On August 18, 1965 the government instituted a proceeding with an Order to Show Cause and Petition under authority of Section 7402(b) and 7604(b) of the Internal Revenue Code of 1954. The purpose of this proceeding was to enforce judicially the three summonses entitled in the matter of the various corporate liabilities served upon the petitioner on March 20, 1965. On September 22, 1965 and October 8, 1965 petitioner filed affidavits stating his factual contentions. On the return date of the Order to Show Cause the District Judge, without taking any further testimony, entered an Order directing the petitioner to produce the corporate records in question (R17a). The United State Court of Appeals for the Third Circuit affirmed this order on March 16, 1966.

Summary of Argument

The principle that corporate records are not the proper subject matter of a claim of the privilege against self-incrimination was first enunciated in the case of *Hale* v. *Henkel,* 201 U. S. 43 (1906). This case set forth two reasons for this holding. The first one was based upon the inherent unfairness of permitting a corporate employee (or officer or director) to claim that his employer's records would incriminate him. Such a holding would mean that an employee may claim the privilege which belongs properly to his employer. The basic impropriety of this caused the Court in *Hale* v. *Henkel* to deny the privilege in that case.

Further in the *Hale* v. *Henkel* opinion there appears a second reason for denying the privilege. The Court described the artificial nature of the corporation as a legal form and how its records must necessarily be available for the sovereign which creates it. It, therefore, found that the corporation was merely a creature of the state and consequently could not deny the state the various inquisitorial powers. The Court attenuated this reasoning by finding that the Federal sovereign also had inquisitorial powers where, as in *Hale,* an interstate commerce question was presented requiring investigation.

The facts in the matter *sub judice* indicate that petitioner was the sole owner, stockholder, officer and director of the corporations involved. The corporations were used for non-business and personal reasons in the main. One of the corporations was used to purchase a home which in turn was transferred to petitioner's ex-wife as a property settlement.

Petitioner contends that *Hale* v. *Henkel* was never intended to apply to this type of "one-man corporation".

The first basis for the holding in this leading case would not apply here inasmuch as there is no employer or third-party of an identity different from petitioner. The sound decisions which have followed *Hale* v. *Henkel* deny the privilege in situations where a one-man corporation has developed into a complex structure with levels of distinct individual responsibilities. Such a complicated business network does not exist in this situation.

The so-called creature of the state theory set forth in *Hale* v. *Henkel* should be limited to the creating sovereign (*i.e.* the individual sister states); and any effort at linking the Federal government with the state government in this respect should be rejected when the effect is to deny a Constitutional right.

ARGUMENT

POINT I

The decisional law which formulated the principle that corporate records may not be a proper subject for a claim of self-incrimination has been misconstrued.

Petitioner contends that the holding of *Hale* v. *Henkel* is soundly bottomed in its conclusion that an agent may not claim his principal's privilege against self-incrimination. It was for this reason, so it is now submitted, that the Court denied the privilege against self-incrimination as to corporate records held by Hale during the course of an investigation by the government of alleged anti-trust violations.

After this principle was stated, the other theory of *Hale* v. *Henkel,* to the effect that a corporation is a creature of the state, and, therefore, must always submit to investi-

gation by the creating sovereign, was actually unnecessary to the holding of this matter of first impression; and, to that extent, it was *obiter dictum.*

In the *Hale* case, Hale was ordered by subpoena to testify and to produce certain records of a corporation. His claim that these records were privileged was first disposed of on the basis that "it was never intended to permit him to plead the fact that some third person might be incriminated by his testimony . . ." 201 U. S. at 69. The decision continued logically to expand upon this reasoning with the ultimate conclusion that there was no basis for the proper claim of the privilege against self-incrimination.

Further on the Opinion observed:

> "A privilege so extensive might be used to put a stop to the examination of every witness . . . with regard to the doings or business of his principal whether such principal were an individual or corporation." *Id.* 70.

Here is a specific reference to the fact that the capacity in which the records were held was the determinative factor and not the mere nature of them (*i.e.* whether they were corporate or partnership or individual). The Court specifically decided that the question as to whether or not a corporation was a "person" within the meaning of the Fifth Amendment was not even presented. *Id.* 70. No effort was made to determine whether the language of the Fifth Amendment concerned with the privilege against self-incrimination would cover a corporation. This is contrary, it is submitted, to the general impression that was created and is still manifested by Court decisions.

Hale also describes the so-called "creature of the state theory" *Id.* 74. The language sets forth the various corporate limitations, *i.e.*, that it is a creature of the state; that it is presumed to be incorporated for the benefit of the public; that it has special privileges and franchises; that its powers are limited by law; and that there is a reserve investigatory right in the legislature to see if it has exceeded these powers. *Id.* 75.

With this basis the Court observes that it is proper that a visitorial exception be permitted with respect to a sovereign and the corporate creature which it created. This does not seem improper. The relationship between a corporation and its creating sovereign is *sui generis*. The corporation is a unique artificial entity created to handle specific business needs. Fault may be found with the *Hale* reasoning, however, when it goes from there to observe that this visitorial exception should also be carried over to the relationship that the Federal government has with a corporation.

Petitioner contends that this reasoning is strained and moreover is unnecessary to the holding of the case. For there is adequate reason for finding that Hale was claiming someone else's privilege and, therefore, should be denied this Constitutional right. The reasoning that the "creating" power of the Federal sovereign should overcome the privilege against self-incrimination is specious and will be dealt with in Point 2.

The dissent in *Hale* amply demonstrates the present contention of the petitioner, *Id.* 82-89. In this dissent Justice Brewer, joined by Chief Justice Fuller, agreed that the Fifth Amendment privilege against self-incrimination is a personal protection and should not be extended to an agent of an individual. There then followed a close analysis of

the Constitutional use of the word "personal", and how often such a word has been held to apply to corporations, *e.g.*, the due process of law clause of the Fourteenth Amendment, the unlawful search and seizure clause of the Fourth Amendment, etc. The dissent then could not distinguish between the "person" or "people" of these amendments and the "person" in the Fifth Amendment; nor can the present petitioner.

The fact remains, however, that the cases have over the years made just such a distinction. In some cases the form of distinction becomes illusory. For example, in the case of *Application of Daniels*, 140 F. Supp. 322 (S. D. N. Y. 1956) the Court found that an officer of a non-resident Panamanian corporation which was undergoing an investigation by a Special Agent of the Internal Revenue Service could properly claim the privilege against self-incrimination as to corporate records. The reason for this exception seems hard to comprehend. A non-resident Panamanian corporation would seem every bit as much a "creature" of the Federal government as a domestic corporation. Both require the keeping of records and the filing of Federal tax returns with the Internal Revenue Service. (Section 861 and Section 881 of the Internal Revenue Code of 1954). Neither are in the position of having been "created" by the Federal government but both have similar obligations of reporting and tax liability.

The other side of the coin is the manner in which the courts have found members of non-corporate organizations to be without the privilege against self-incrimination. For example, generally members of a partnership may be permitted to claim the privilege against self-incrimination as to partnership records by virtue of the personal nature of the partnership. However, where a partnership is large and complex enough as to warrant the imposition of the

"principal agent" theory of *Hale* v. *Henkel,* then even these individuals may not properly claim the privilege against self-incrimination. *United States* v. *Silverstein,* 210 F. Supp. 401 (S. D. N. Y. 1962), affirmed 314 F. 2d 789 (2 Cir. 1963); *United States* v. *Guterma,* 272 F. 2d 344 (2 Cir. 1959). The Supreme Court has come to the same conclusion with respect to the records of a labor union, *United States* v. *White,* 322 U. S. 694 (1944). The language in *White* which appears so compelling to petitioner's case appears at page 699:

> "[T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity.*" (emphasis supplied)

Later on, at page 701, appears:

> "The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents but rather to embody their common or group interests only."

This language of *White,* particularly the phrase appearing at page 699, has provided the warrant for many subsequent decisions, among them, significantly, *Application of Daniels, supra.*

Both *Application of Daniels* and *Silverstein* really emphasize the "capacity" test as the principal factor to be determined. The decisions have gone, it is respectfully observed, astray where they conclude that the "nature" of

the records for which protection is sought should be the sole determinative factor. To the extent that the cases have adopted *Hale's* "creature of the state" theory (and there have been many, there is no denying), it is contended that the Courts have improperly judged the *nature* of the evidence as the sole criterion for determining whether the privilege may be maintained. Therefore, so this line would reason, a corporation, *ipso facto,* taints its records with a permanent quarantine from the privilege against self-incrimination.

The case of *Grant* v. *United States,* 227 U. S. 74 (1913) dealt with a one-man corporation. The actual holding concerned only the right which the individual's attorney had with respect to records the individual had given him. In pure *dictum,* the Court also stated that the individual couldn't claim this privilege either. For its authority for this statement, the Court relied upon "recent decisions." It appears that the Court was referring to *Wilson* v. *United States,* 221 U. S. 361 (1911). *Wilson* appears to be the starting point for the elevation and respectability of the second theory of *Hale* v. *Henkel.* From *Wilson* on in there is considerable support for the unquestioning thesis that a corporation's books, *ipso facto,* are not the proper subject of a claim of the privilege against self-incrimination by the possessor of same.

This is not what *Hale* had intended the law to be; and a reasonable following of the *Hale* thesis would sustain an individual's right to the privilege against self-incrimination in respect to corporate records where such an individual is the sole person associated with the corporation and the corporation in question was used for demonstrably non-business personal reasons.

POINT II

Assuming, without accepting, that this decisional law has been validly followed, such a principle is erroneous and should no longer be followed.

The Petitioner submits that the essence of the privilege against self-incrimination is thwarted by the artificial distinction between records of a "corporate nature" and records of a "personal nature". If an *individual* is required to turn these records over and if they are incriminatory as to him, the effect upon the individual is the same as if he had been required to produce personal records.

Certainly, the English cases have followed this reasoning and have consistently held that corporate records may be the subject of a proper claim of self-incrimination. *Rex* v. *Purnell*, 1 Black. W. 37, 96 Eng. Rep. 20 (KB 1749); *Reg.* v. *Granatelli*, 7 State Tr. (ns) 979 (1849); *Rex* v. *Cornelius*, 2 Str. 1210, 93 Eng. Rep. 1133 (KB 1744).

The distinction between corporate records and individual records, particularly in cases such as this, sometimes yields anomalous results. For example, *Application of Daniels, supra*. As stated, the court apparently felt that by virtue of the corporation being a non-resident Panamanian entity, the individual corporate officer who was being interrogated was holding the records in a different capacity. In any event, it is an illustration of the basic unfairness and inconsistent approach that this kind of principle engenders.

The bald fact of compulsory personal self-incrimination is a difficult concept to fathom within the framework of our Constitutional government. It should be emphasized that petitioner is not seeking here a change which would permit a *corporation* to claim the Fifth Amendment privilege (although the reasons for excluding the corporation, as such,

do not appear compelling); on the contrary, the Petitioner is claiming that an individual may properly assert the privilege against self-incrimination as to corporate records which, if yielded to the investigatory power, would tend to incriminate him personally.

This concept does not appear to be an unwarranted extension of the basic privilege. The eminent Wigmore has stated:

> "It should be noted that the policies of the privilege [against self-incrimination] appear to apply where a person is required to produce records—no matter whose or what—which incriminate *him*. Consistency therefore dictates that the privilege be available here unless special considerations weigh sufficiently to the contrary." 8 Wigmore, *Evidence*, §2259b, p. 359 (McNaughton rev. 1961)

In this case the simple facts are that petitioner has been ordered by a court to turn over records which he claims to be incriminatory as to himself personally (and with adequate bases). If such an order is to be implemented (it is presently being stayed), the "special considerations" entertained by Wigmore would have to be manifest. Petitioner claims such is not the case.

CONCLUSION

No intrusion on *stare decisis* is contemplated if the Court were to grant this application for a writ of certiorari. The leading cases have held that it is the *capacity* in which records are held which determines the holder's right to claim the privilege against self-incrimination. The thrust of the capacity test is the quality of the holding, i.e. is the evidential material held in a personal or non-personal capacity? This valid principle, enunciated at the turn of the

century, should be sustained and the petitioner herein does not urge its rejection.

To the extent that precedent would also urge a "visitorial" exception, or a "creature of the state" exception to this privilege in respect to corporations, it is submitted that the only sovereign which could legitimately lay claim to this type of exception would be one of the sister states, and not the Federal government.

It is furthermore contended that a basic holding is now required which would remove a glaring unfairness and seeming compromise from the intendment of so important and venerated a right as the privilege against self-incrimination.

Respectfully submitted,

HERBERT L. ZUCKERMAN,
Counsel for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15715

UNITED STATES OF AMERICA and WELLESLEY R. SLIFER,
Special Agent, Internal Revenue Service

vs.

CHRISTIAN CHRISTIANSEN; CHRISTY CORPORATION;
MILLVILLE CORPORATION and KING & PRINCE, INC.,
CHRISTIAN CHRISTIANSEN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Argued February 25, 1966

Before: HASTIE and SMITH, *Circuit Judges;* and KIRKPATRICK, *District Judge.*

Opinion of the Court

(Filed March 16, 1966)

PER CURIAM:

This is an appeal from an order requiring the sole shareholder of a corporation to comply with demands of the

Internal Revenue Service that he produce certain corporate books and records. The sole question is whether the order violates the shareholder's privilege against self-incrimination. We have recently examined this contention and rejected it in an essentially like case. *Wright* v. *Detwiler*, 1965, 345 F. 2d 1012.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15715

UNITED STATES OF AMERICA and WELLESLEY R. SLIFER, Special Agent, Internal Revenue Service

vs.

CHRISTIAN CHRISTIANSEN; CHRISTY CORPORATION; MILLVILLE CORPORATION and KING & PRINCE, INC., CHRISTIAN CHRISTIANSEN,

Appellant.

(D. C. CIVIL No. 900-65)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE and SMITH, *Circuit Judges* and KIRKPATRICK, *District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed October 29, 1965, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

March 16, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1260

CHRISTIAN CHRISTIANSEN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 19, 1965, a special agent of the Internal Revenue Service served petitioner, in his capacity as officer or director of three corporations, with three summonses pursuant to § 7602 of the Internal Revenue Code of 1954 (R. 3a, 8a-9a, 11a, 14a-15a).[1] These summonses called for the production of certain *corporate* books and records; no personal papers were sought

[1] "R." references are to the appendix filed by the appellant in the court of appeals.

(R. 3a). Petitioner appeared as directed but refused to comply with the summonses, asserting his personal privilege against self-incrimination (R. 9a, 11a, 15a).

The instant action was then begun to enforce compliance with the summonses (R. 7a-12a). In opposition, petitioner argued only that the corporate records were clothed with his personal privilege against self-incrimination, inasmuch as he was the sole shareholder of two of the corporations (R. 12a-16a).[2] The district court rejected this argument and ordered the corporate records produced; the Third Circuit affirmed *per curiam* (Pet. 15-16).

This Court has consistently held that a stockholder, officer or other custodian of corporate records may not interpose his personal privilege against self-incrimination when called upon to produce corporate records in his possession. *Wilson* v. *United States*, 221 U.S. 361; *Wheeler* v. *United States*, 226 U.S. 478, 490; *Grant* v. *United States*, 227 U.S. 74, 79-80; *Essgee Co.* v. *United States*, 262 U.S. 151; *United States* v. *White*, 322 U.S. 694, 699-700; *Nilva* v. *United States*, 352 U.S. 385, 392; *Curcio* v. *United States*, 354 U.S. 118, 122, 124-125, 128. Indeed, this Court was squarely faced with the precise issue here presented in the

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[2] As to the third corporation, petitioner alleged that his only connection with it had been to act as an officer in its dissolution as an accommodation to his brother, who was its sole shareholder (R. 15a). In view of these facts it appears he does not have even a colorable claim of privilege as to the books of that corporation.

Grant case, *supra*;[3] it held that the privilege was unavailable even to "the sole stockholder" of the corporation. 227 U.S. at pp. 77, 80.[4]

Contrary to petitioner's suggestion (Pet. 10), *United States* v. *White* in no way departs from this settled principle. This Court's *White* opinion not only explicitly reaffirmed the principles enunciated in the above cases, it extended this principle ever further,

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[3] Petitioner's attempt to relegate this holding to dictum (Pet. 11) is incorrect, for the attorney in that case who held the records was attempting to assert his client's (the sole shareholder's) privilege against self-incrimination. Thus it was necessary for this Court to determine whether the client-sole shareholder could have invoked the privilege.

[4] This same view has been expressed recently with approval by various courts of appeals. As the Second Circuit held in *Hair Industry, Ltd.* v. *United States*, 340 F. 2d 510, 511, certiorari denied, 381 U.S. 950:

> Indeed, *United States* v. *White* reiterated the rule that the privilage cannot be utilized on behalf of a corporation. 322 U.S. at 699, 64 S. Ct. at 1251. Today, with the tax consequences vis-à-vis the sovereign flowing from the use of the corporate form—income accumulation possible under some circumstances free from personal income tax, for example—the visitorial powers are more than ever necessary to the sovereign, and justify the courts in holding that any claim to the personal privilege is relinquished as to corporate records by the choice of the corporate form for an individual's business. Corporate records, which would tend to incriminate a corporate officer, can be subpoenaed even where the corporation is a mere alter ego of its owner. [Citations omitted.]

Accord, *United States* v. *Fago*, 319 F. 2d 791, 792-793 (C.A. 2), certiorari denied, 375 U.S. 906; *United States* v. *Guterma*, 272 F. 2d 344, 346 (C.A. 2); *Wild* v. *Brewer*, 329 F. 2d 924 (C.A. 9), certiorari denied, 379 U.S. 914; *Wright* v. *Detwiler*, 345 F. 2d 1012 (C.A. 3).

holding that in some situations the officers or members of even an *unincorporated* assocation may be denied the privilege against self-incrimination with respect to assocation records. Thus the *White* case does not represent any departure from or limitation on this Court's well established holdings regarding the nonapplicability of a personal privilege to *corporate* records.

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

MAY 1966.

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